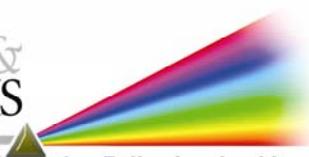




The Center For Information Policy Leadership



MARTIN E. ABRAMS
DIRECT DIAL: 404-888-4274
E-MAIL: mabrams@hunton.com

FILE NO: 59007.000002

September 13, 2004

Federal Trade Commission
CAN-SPAM Act
Post Office Box 1030
Merrifield, VA 22116-1030

Re: **CAN-SPAM Act Rulemaking, Project No. R411008**

Ladies and Gentlemen:

This letter is submitted by the Center for Information Policy Leadership at Hunton & Williams (CIPL)¹ in response to the request for public comments on the proposed regulations contained in the **Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act**. This letter was prepared by Martin E. Abrams, Executive Director of CIPL; Margaret P. Eisenhower, head of the Hunton & Williams Privacy and Information Management Practice; and Lisa J. Sotto, Hunton & Williams' Privacy Regulatory Practice Leader.² Please note that the views expressed herein are those of the authors alone, and do not necessarily reflect the views of CIPL member companies or Hunton & Williams, LLP or its clients.

The Center for Information Policy Leadership has an established CRM Education Project, which (i) examines all facets of privacy and information security in the context of customer relationship

¹ The Center for Information Policy Leadership provides a unique combination of strategic consulting, legal, and policy development services for information industry and information-dependent companies. The Center brings together business leaders, government officials, consumer advocates, and academic experts to provide thought leadership on a variety of information policy topics, including global privacy law development, privacy notices, public-private data sharing, and use of personal information for authentication. The Center's internationally-recognized privacy experts advise chief privacy officers and other senior executives on the implementation of global information management programs as well as the development of effective privacy laws.

² Mr. Abrams also serves as Senior Policy Advisor to the Hunton & Williams law firm. He is not a lawyer. Ms. Eisenhower is admitted to practice law in Georgia and Florida. Ms. Sotto is admitted to practice law in New York and Washington, D.C.

management and consumer marketing and (ii) educates businesses, consumer leaders and policy makers about appropriate CRM and consumer marketing solutions. In particular, we have been exploring issues related to appropriate e-mail marketing and how companies can best meet consumer expectations in a balanced, effective manner. These comments reflect our understanding of how to accomplish these goals using the framework established by the CAN-SPAM Act of 2003. Our comments are focused on the following topics:

- mechanisms for determining “commercial” e-mails, particularly in the context of business-to-business communications, and
- special communications that should not be considered commercial electronic mail messages.

We appreciate your consideration of our views on each of these topics.

I. Business-to-Business Communications

As we noted in our earlier comments to the Advance Notice of Proposed Rule-making (ANPR), commercial communications drive our competitive economy. The Commission appropriately identified the need to maintain the flow of legitimate communications as a major objective of this rule-making process. While the CAN-SPAM Act provides an opportunity for the Commission to address the very real problems created by deceptive and harassing communications to individuals, it is vital that it not impede the very efficiencies that the Internet has created.

The CAN-SPAM Act and this regulatory process are meant to establish a framework for a communications system to facilitate “the development and growth of frictionless commerce.”³ For the continued vitality of commerce, the Act must be clarified to better distinguish consumer communications from traditional business-to-business communications. Unfortunately, the plain language of the Act does not lend itself to the challenging work of building a framework to support the needs of business-to-business communications. For instance, Section 3(17)(A) uses examples that are much more relevant in the business-to-consumer marketplace than the business-to-business domain.

It is vital that the Commission look beyond the business-to-consumer environment when crafting CAN-SPAM regulations. We are concerned that the tests that the Commission has crafted for determining the primary purpose of an e-mail, including the “reasonable consumer” standard, do not provide adequate guidance for senders of business-to-business communications. Please note that we are not suggesting that business-to-business communications should not be covered by the Act; we agree that they are. Instead, we suggest that business-to-business communications require rules that are appropriately nuanced to reflect the particular needs of senders and

³ CAN-SPAM Act of 2003 at § 2(a)(1).

recipients in this context. The CAN-SPAM Act clearly empowers the FTC to refine the Act's definitions and to develop "primary purpose" standards that provide the appropriate level of nuance.

The CAN-SPAM Act establishes two categories of e-mail messages. The first, a "commercial electronic mail message" (CEMM), is an e-mail message that primarily advertises or promotes a product or service. The second, a "transactional or relationship message" (TRM), is one that primarily informs the recipient about a transaction or provides information pursuant to an existing relationship between a sender and a recipient. CEMMs carry certain regulatory obligations that TRMs do not. As mentioned above, the definitions within the Act provide examples that are oriented toward a business-to-consumer relationship. As the Commission interprets the distinctions between CEMMs and TRMs, it should consider the business-to-business context as well.

The costs of hindering business e-mail communications should not be underestimated. Consider how business processes have evolved over the past ten years. Many companies today will accept vendor information only via e-mail, leaving no alternative for the sales process to proceed. The Proposed Rule specifically requests information on how the Rule would affect small businesses. We believe the lack of distinction in the primary purpose test between business-to-business and business-to-consumer communications could significantly impact small businesses.

This issue is accentuated by the structure of CAN-SPAM. The term "commercial electronic mail message" is inappropriate to describe a business-to-business communication. The Act defines a CEMM as any electronic mail message the primary purpose of which is the advertisement or promotion of a commercial product or service. There is a bright line between an "advertisement" and other business communications. There is no such bright line between a "promotion" and other business communications. While the concept of advertising is fairly clear, the concept of promotion is not. It encompasses activities (including advertising) that further the growth of a product or service. The Act requires the Commission to examine additional criteria in defining "primary purpose," not only because many e-mails include many messages, but also because the definition of "promote" needs to be limited -- especially in the business-to-business context -- to ensure the Act's rules are not applied to an unduly broad class of messages. The Proposed Rule does not yet provide the additional criteria needed to determine the primary purpose of many business-to-business communications.

Please consider "promotional" communications. Many companies employ armies of individuals (sales representatives, for example) who send e-mails to their customers with information on new features, price changes, special deals and other information that facilitates the sales process. While sales representatives are the obvious example, these senders go beyond the sales force, and include senior executives and other professionals who view customer relations as part of their essential functions.⁴ These include mixed commercial and non-commercial content, but it

⁴ Consider the Hunton & Williams law firm as an example. The firm consists of nearly 900 professionals, most of whom maintain a list of current and potential clients. While the firm

would be difficult to ascertain whether they would be considered “commercial” given the tests set forth in the Proposed Rule. For example, the “subject-line” component of the test assumes that business people who communicate with customers and prospects in a low-volume manner craft subject-lines with a distinction between “commercial” and “relationship” in mind. In fact, in the business/professional context, there is little distinction between these concepts. Dual-purpose messages sent to business clients typically seek to strengthen the commercial dealings between the parties by strengthening the relationship.⁵ Accordingly, the common e-mails from a sales representative labeled “product news” (or from a lawyer labeled “client alert”) do not fit well under the subject-line test.

Additionally, while we could debate how the various dual-purpose tests are applied to any particular e-mail, there is no bright line to guide a company’s internal compliance group or the Commission’s enforcement staff. This uncertainty will wreak havoc on compliance efforts and dampen the very e-mail initiatives that are needed to foster frictionless commerce. Because dual-purpose messages can easily fall on either side of the commercial line, companies will have to restrict these messages unless and until they establish firm criteria for such messages, provide training to all personnel on the criteria, and provide other compliance mechanisms.

Section 3(17)(B) of the Act provides the Commission with the authority to expand or contract the definition of a transactional or relationship message to accomplish the purposes of the Act. To achieve the goal of using e-mail to facilitate “the development and growth of a frictionless economy,” we recommend that the Commission either (1) establish a separate standard for determining the primary purpose of business-to-business communications that takes into account the need to facilitate routine corporate and professional communications, or (2) reconsider the definition of TRM to include the types of routine business-to-business communications that occur outside the traditional corporate advertising arena.

maintains a centralized database for conflicts management, professional development generally is done by practice groups (such as the privacy practice) and individual lawyers. Most lawyers control their own client relationship and development efforts, which often consist of sending current and potential clients small-volume e-mails attaching articles, client alerts, or other legal news. The purpose of the e-mails is, in part, to promote the services provided by the particular legal professional sending the e-mail and, therefore, the services of the firm. But these e-mails have other purposes too, including education (notifying recipients of new legal requirements) and customer (or client) service.

⁵ For example, client newsletters sent by a law firm typically contain information on legal developments that may impact the client’s business. These newsletters are provided as a service, expected and desired by clients, to further the relationship between the law firm and the client. It is undeniable, however, that the messages are also commercial. The newsletters highlight issues that the law firm can assist the client in managing. Given the language of the Proposed Rule, it is unclear how these types of communications would be viewed by the Commission.

In the business-to-business context, we believe an e-mail should be a TRM if its primary purpose is to provide content to the recipient that is either (1) reasonably related to the types of products and services the sender offers and the recipient purchases, or (2) reasonably designed to further a commercial relationship between the sender and the recipient.

II. Special Communications That Should Not Constitute CEMMs

As we discussed in our comments to the ANPR, we believe the Commission should expand the definition of TRM to encompass true “opt-in” communications in both the business and consumer contexts. We are concerned that the Proposed Rule omits the opt-in e-mail situation.

Consider a subscription-based service, such as a newsletter or other regular communication based on opt-in consent. The primary purpose of opt-in communications is to convey the requested content. These messages should always be considered TRMs. If the recipient has specifically requested the content, then delivery of that content is the transaction contemplated by the recipient, even if the content is generally promotional or advertising (such as an airline’s weekly specials or monthly product deals). While it is appropriate for companies to offer subscribers of these services the ability to opt out (or unsubscribe), companies sending these requested e-mails should not be required to treat these e-mails as CEMMs, thereby potentially disrupting opt-in consumers’ receipt of requested subscription-based communications.

Failure to make this distinction would deprive both businesses and consumers of the ability to opt into limited levels of communications. For example, when subscribing to an airline’s weekly fare specials mailing list, an airline might ask the consumer if it may send the consumer other types of advertising e-mails. The consumer may decline to receive these communications, but would still be able to obtain the weekly fare specials messages. If a fare specials message is considered a CEMM, the airline could not send it if the consumer otherwise opts out. This result would reduce consumer choice and flexibility. Accordingly, subscription and other opt-in communications should always be classified as TRMs.

III. Conclusion

Congress enacted the CAN-SPAM Act of 2003 to reduce the volume of fraudulent, misleading and unwanted e-mail advertisements, and to create a framework for efficient business communication over the Internet. By refining the definitions and primary purpose tests to accommodate the special needs of business-to-business communications, both of these goals can be met.

Thank you very much for your interest in this topic and for your consideration of our comments. If you have any additional questions, we would be pleased to respond.

Very truly yours,

THE CENTER FOR INFORMATION POLICY LEADERSHIP AT HUNTON & WILLIAMS

s\ *Martin E. Abrams*
s\ *Margaret P. Eisenhower*
s\ *Lisa J. Sotto*